No. 12,261

IN THE

United States Court of Appeals

For the Ninth Circuit

COMPANIA ENGRAW COMERCIAL E. INDUSTRIAL S. A. (a corporation),
Plaintiff and Appellant,
vs.
SCHENLEY DISTILLERS CORPORATION (a corporation),
Defendant and Appellee,
and
SCHENLEY DISTILLERS CORPORATION (a corporation),
Defendant and Appellant,
vs.
COMPANIA ENGRAW COMERCIAL E. INDUSTRIAL S. A. (a corporation),
Plaintiff and Appellee.

BRIEF OF APPELLEE SCHENLEY DISTILLERS CORPORATION.

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Plaintiff and Appellee.

BRIEF OF APPELLEE

SCHENLEY DISTILLERS CORPORATION.

I.

PRELIMINARY STATEMENT.

In this action for breach of contract, a judgment was rendered in favor of plaintiff[1] in the sum of $5,845.25, with interest from June 6, 1946.[2] Plaintiff has appealed from this judgment claiming that the trial court erred in several respects in determining the amount of damages. Defendant has also appealed, claiming that the trial court erred in holding that a contract existed between the parties or that plaintiff could have performed any contract found to exist.

This brief is a response to plaintiff's opening brief and is limited to the issue of damages. Defendant does not concede that plaintiff is entitled to damages in any amount, but the basis for this contention is the subject of the briefs filed in connection with defendant's cross-appeal from the judgment.

In this responding brief, therefore, it is necessary, for the sake of argument, to assume that a contract existed between the parties which plaintiff could have performed. Upon such assumption, defendant contends that the trial Court correctly assessed damages in the sum of $5,845.25.

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[1]To avoid confusion on these cross-appeals, the parties will be designated herein as plaintiff and defendant rather than as appellant and appellee.

[2]Tr. p. 70. (All references will be to the pages of the printed transcript.)

II.

STATEMENT OF THE PLEADINGS AND JURISDICTION.

In plaintiff's complaint,[3] amended complaint,[4] and amendment to amended complaint,[5] it pleads that defendant breached a contract entered into between the parties on May 23, 1946, under which plaintiff sold 1135 tons of Argentine glucose to defendant, at a price of 1.375 pesos per kilo, to be delivered in monthly installments over the months of June, 1946, to December, 1946, both inclusive; that payment was to be made at an exchange rate of 335.82 Argentine pesos to 100 American dollars.[6]

In its original complaint, plaintiff pleaded that it purchased glucose in Argentina at a price of 1.20 pesos per kilo to enable it to perform the contract, and that after incurring certain costs for export, it would have realized a profit of $34,685.72.[7] In the amended complaint plaintiff alleged market prices of from 60 to 57 centavos per kilogram over the period of the contract; plaintiff took these alleged prices, added other costs of performance, and arrived at an allegation of damages in the amount of $212,427.99. This figure apparently represents the difference between cost to plaintiff of performance on the facts alleged, and the contract price.[8] In a second count in

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[3]Tr. p. 2.
[4]Tr. p. 18.
[5]Tr. p. 54.
[6]Tr. pp. 4, 20.
[7]Tr. p. 5.
[8]Tr. pp. 22 and 23.

the amended complaint, plaintiff alleged that it "sold and disposed of the whole of said 1135 tons of glucose" on April 9, 1947; that the *market price* on that day was 50 centavos per kilogram, and the cost of preparing the glucose for export was 15 centavos per kilogram; that the difference between the *cost to plaintiff* of this "sale" on April 9, 1947, was $219,686.13, which sum, when deducted from the contract price, left $245,034.55, for which plaintiff prayed judgment.[9]

By motions to dismiss and to make more definite statement, defendant challenged the allegations of damages and the measure of damages sought to be pleaded in both complaints,[10] but all such motions were denied.[11] All of the above allegations were put in issue by defendant.

As stated by plaintiff, jurisdiction of the District Court is based upon 28 U.S.C. 1332, and jurisdiction of this Court is based upon 28 U.S.C. Sections 1332, 1291 and 1294. The allegations in the pleadings of the jurisdictional facts are found at pages 18 and 45 of the transcript.

[9]Tr. pp. 24 and 25.
[10]Tr. pp. 11, 30 to 33, 38 to 40.
[11]Tr. pp. 17, 44.

III.

STATEMENT OF THE CASE.

A. THE ISSUES.

Plaintiff's appeal relates solely to the issue of damages.

The trial court held[12] that: (1) the damages recoverable by plaintiff are the difference between the contract price and the market price of the glucose on June 6, 1946;[13] (2) there was a continuous market for glucose in Buenos Aires both for export and domestic consumption;[14] (3) the applicable market price was the *export* market price which, on that date, was 1.35 pesos per kilo;[15] and (4) plaintiff was entitled to recover only such number of American dollars as would purchase, on the date of the judgment, the amount of pesos in which plaintiff had been damaged.[16] The trial Court also found that certain dealings between the parties after June 6, 1946, were negotiations to settle the dispute between plaintiff and defendant and did not contemplate a reinstatement of the contract, nor did they relate to any agreement to postpone deliveries called for by the contract.[17]

Plaintiff contends that (1) damages should be measured by the differences between contract price and the market prices on the respective delivery dates;

[12]Tr. pp. 62 to 69.
[13]Tr. pp. 59, 67, 69.
[14]Tr. p. 66.
[15]Tr. p. 66.
[16]Tr. p. 67.
[17]Tr. p. 65.

(2) the proper market price to be used in the formula was the *price at which it, plaintiff,* could have *purchased,* rather than the price at which it could have *sold;* (3) the market price to be taken is the *domestic* (Buenos Aires) rather than the *export* market price; (4) the finding of an export market price on June 6, 1946, of 1.35 pesos per kilo is unsupported by the evidence; and (5) plaintiff is entitled to have the judgment for American dollars computed at an exchange rate which would enable it to purchase substantially more pesos than the amount in which it was allegedly damaged. Plaintiff also contends that the evidence compels the conclusion that negotiations after June 6, 1946, were for the purpose of delaying deliveries to defendant.

Plaintiff's statement of facts does not include all of the matters which we deem relevant to the above issues. We will, therefore, present the facts and then demonstrate the correctness of the trial Court's judgment with respect to damages.

B. THE FACTS.

We will state the facts in chronological order but will attempt to group those pertinent to the contentions on this appeal.

(1) Facts bearing upon the issue of whether the negotiations following June 6, 1946, were. as found by the trial Court, to settle any claimed liability, or, as plaintiff contends, merely extended the delivery dates.

On June 6, 1946, defendant informed plaintiff by telephone that it was terminating negotiations for the sale of glucose,[18] and on the following day, wired to plaintiff:[19]

> "Following our telephone conversation of yesterday, and in response to your request that said conversation be confirmed in writing. We advise that we are not entering into any agreement with CIA Engraw Commercial and Industrial SA for the purchase of glucose."

In its original complaint, plaintiff alleged:[20]

> "That on or about the 7th day of June, 1946, defendant repudiated said contract and notified said plaintiffs by telegram to proceed no further therewith."

In its amended complaint, plaintiff pleaded:[21]

> "That plaintiff immediately thereafter commenced negotiations with said defendant and said defendant actively and continuously negotiated with said plaintiff for the completion of said contract and deliveries thereunder up to and until the 18th day of September, 1946; that on or about said 18th day of September, 1946, said defendant definitely refused to accept any deliveries under or pursuant to said contract."

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[18] Tr. p. 143.
[19] Tr. p. 144; Pltf's. Exh. 13.
[20] Tr. p. 5.
[21] Tr. pp. 21-22.

Upon receiving defendant's June 6th notice, plaintiff wired defendant[22] on June 8, 1946:

> "You received ours giving specifications of contracts purchased for your account and laboratory test June shipment glucose stop We believe we are entitled courtesy cable reply stop We are not speculators and if you don't desire coverage will liquidate but if loss occurs must protect our interests stop If glucose desired please cable number letter credit socan proceed June shipment stop For personal reference Reuben Hays Firstnational Cincinnati"

Several days later defendant responded to plaintiff[23] by cable to Buenos Aires:

> "Replying your cable our negotiations have been carried on with Whipple Los Angeles who has been kept fully informed of our position regret exceedingly confused situation which has developed and suggest you advise me Schenley Newyork of extent of your uncancellable commitments also telephoning Whipple today."

In response plaintiff cabled defendant on June 14th, 1946[24]:

> "Accordance your cable and to eliminate confusion are cabling Whipple extent uncancelable commitments and amount liquidation damages."

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[22]Tr. pp. 279-280; Pltf's. Exh. 28.
[23]Tr. p. 283; Pltf's. Exh. 29.
[24]Tr. p. 285; Pltf's. Exh. 30.

On June 24, 1946, Mr. L. B. Stanton, one of plaintiff's attorneys of record, acting for plaintiff and Whipple wrote defendant as follows:[25]

"In respect to the contract between yourselves, on the one part, and Compania Engraw Commercial & Industrial S. A. and Harold A. Whipple on the other part, for glucose to be shipped from Argentina:

"We have today reviewed the entire correspondence, letters, cables and telephone conversations; with this in view, the writer today phoned to Mr. Berger at Buenos Aires, and as a result of that telephone call and our former communications, we state as follows:

"The difference between the contract selling price to your corporation and the purchase price of the glucose in question—$59,146.55

"As a result of your refusal to comply with the contract, our people have suffered damages for cancellation in the sum of—$31,750.00

"A total damage of—$90,896.55

"As against this, you are entitled to 5 centavos difference between the F.A.S. and F.O.B. contract of—$16,899.02

"Net damage to our people to date of—$73,997.53

"We wish to further advise that unless this account is settled promptly the cancellation costs will unquestionably increase, and thereby the loss to which our people have been placed will likewise increase.

[25] Tr. pp. 845-847; Deft.'s. Exh. R-3.

"You must understand that our people entered into contracts for purchase of glucose under the contract with you, in order to comply with your requirements as specified in your shipping instructions, and although we have done everything in our power to minimize the loss, the figure as stated of $31,750 is our least cost in case of present cancellation.

"I understand that there is every expectation that the market will change so as to increase this loss.[26] Please let us know immediately as to your disposition so that we can be advised as to further procedure."

On June 26, 1946, defendant replied to Mr. Stanton:[27]

"We have your letter of June 24, which refers to a contract between this company and Cia Engraw Commercial & Industrial, S. A. and Harold A. Whipple for glucose to be shipped from Argentina.

As we have informed you on the telephone, there is *no such contract in existence."*

On June 24th Mr. Dichter who was in South America on business for defendant was instructed by defendant as follows:[28]

"June 24, 1946.

"Statement for Dichter:

During the month of May Schenley thought they would require a very large quantity of glu-

[26]Emphasis here and elsewhere is added unless otherwise noted.
[27]Tr. p. 847; Deft's. Exh. R-3.
[28]Tr. pp. 324-325; Pltf's. Exh. 40.

cose. Personnel on the Pacific Coast negotiated with Whipple, a Lost Angeles broker, with CIA. Engraw Comercial & Industrial, S. A. (address: San Martin 329, Buenos Aires) for 1,135 tons of Argentine glucose, the price to be 1.375 pesos per kilogram, C.I.F. Los Angeles. This figures out 0.22293¢ per lb. f.o.b. Los Angeles, including 2¢ duty. The above for shipment as follows:

Terms—Sample to be approved, letter of credit for the full value to be opened in favor of Engraw. The same was never submitted and the credit was never opened and it develops that Schenley does not need this material. Therefore, we asked for cancellation of any responsibility due to negotiations. Engraw appears willing to cancel but is asking 2¢ per pound to cover loss.

I suggest you proceed to Buenos Aires immediately to learn the following:

(1) The present situation and price of glucose in the Argentine.

(2) Is glucose in short supply?

(3) Is export license required?"

On July 8, 1946, a cable prepared by plaintiff, Dichter and Berger was sent to defendant:[29]

"Cancellation here would cost approximately fortyfivethousand Dollars stop However opening of lettercredit would atonce eliminate penalty to extent of thirtythousand dollars and would provide necessary time for orderly liquidation over contract period which is for balance 1946

[29]Tr. pp. 288-289; Pltf's. Exh. 31.

stop Also sale over such extended period should further reduce probable loss if any to nominal amount therefore we suggest we act as your agents to liquidate contract using our judgment as to manner of liquidation[30] having in mind reduction of loss to minimum or entirely stop If agreed please advise so we can inform contractors and open lettercredit thru Firstboston these calculations don't cover Whippl will you deal with him directly."

No one on defendant's behalf ever agreed to this "plan" of liquidation, or to any other plan[31]. The cable last quoted contemplated sales to third parties; not deliveries to defendant.

On July 12, 1946, Mr. Metcalf prepared an interoffice communication[32].

"I talked to Messrs. Berger and Dichter regarding the Engraw glucose matter. I told Mr. Berger that we had retained Monsen & Freeman of New York to represent us in settling this matter and that Dr. Victor Goytia, 501 Avenida Rogue, Saenz Pena, Buenos Aires, was the Argentina representative of Monsen & Freeman and that they were to get in touch with Dr. Goytia in relation to this matter.

"Berger told me that he was very well acquainted with Dr. Victor Goytia and that, as a matter of fact, he had done legal work for Engraw and was

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[30]Plaintiff on p. 43 of its brief purports to quote from this cable, but begins its quote with the word "Opening" and closes it with a period after "liquidation".

[31]Tr. pp. 648 to 649.

[32]Tr. pp. 321-322; Pltf's. Exh. 38.

thoroughly familiar with the glucose situation so that he would not anticipate any difficulty in working this out with Dr. Goytia."

On September 18, 1946, plaintiff wrote defendant:[33]

"This is to notify you that the suppliers with whom we contracted for the 1135 tons of glucose which we bought for your Company have finally refused to accept cancellation of the contracts. We are, therefore, proceeding to sell the glucose at best prices obtainable and will, of course, look to you for payment to us of the difference between the prices thus obtained and the price at which you contracted to purchase the same."

On September 20, 1946, defendant replied:[34]

"Your letter of September eighteenth has been received and in reply we beg to advise that the statement in your letter that you bought glucose for our Company is incorrect and that, as you have been previously and repeatedly advised, we have no obligation to you in the matter."

Nowhere in the record is there any evidence that any negotiations or any conversations ever took place after June 6, 1946, which contemplated acceptance by defendant or delivery to defendant of any of the glucose which was the subject matter of the alleged contract. The evidence is without conflict, and the court found, that the negotiations and correspondence were solely directed to a settlement of the dispute between the parties.

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[33]Tr. p. 316; Pltf's. Exh. 36.
[34]Tr. p. 318; Pltf's. Exh. 37.

On the basis of this evidence the trial court found:[35]

> "7. That it is true that during the period June 6, 1946, to September 18, 1946, the parties negotiated for a settlement of any liability which might have existed on the part of defendant to plaintiff. Defendant did not actively or continuously or otherwise negotiate with plaintiff during said period or at any other time for the completion or restoration of said contract or deliveries thereunder but at all times maintained its claim that no contract existed between it and plaintiff and at all times definitely refused to accept any deliveries under or pursuant to said contract. At no time did defendant encourage, induce, or otherwise cause or lead plaintiff to defer or postpone any action it might have taken for the disposal of said glucose. On September 18, 1946, in the City of New York, plaintiff made and delivered to defendant a notice in writing of its intention to resell said 1135 tons of glucose."

(2) **The rate of exchange.**

Under Argentina law there was a "pegged" rate of exchange for pesos and dollars with respect to the sale by exportation of glucose. This "pegged" rate of exchange was different from the then current rate of exchange, but was a government regulation and did not increase the amount of pesos actually received by a seller of glucose.[36] The exchange rate for export glucose was fixed at 1 to 3.3582. The free

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[35] Tr. p. 65; Findings of Fact.
[36] Tr. pp. 352 to 356.

rate of exchange at the date of the judgment was 1 to 4.85[37]. Had this alleged agreement been performed, defendant would have purchased pesos from a *bank* through a letter of credit, and plaintiff would have received only the price in pesos stipulated in the contract.[38]

(3) Market price.

Plaintiff pleaded in its amended complaint:[39]

> "That there was an actual market in the City of Buenos Aires, Argentina, for the purchase and sale of glucose made from pure, crystal clear corn syrup and testing between 43° and 45° Baume, both for internal consumption *and for exportation,* during the period from May 23, 1946, to May 7, 1947; that the market price for said glucose at and in the Buenos Aires market for the months, commencing with June, to and including the month of November 1946, was the sum of 60¢ per kilogram; that the market price for said glucose in said Buenos Aires market for deliveries during the month of December, 1946, was the sum of 57¢ per kilogram; that said market prices were for bulk glucose; that the cost of cooperage to place said glucose in kegs containing 660 pounds each and to deliver said glucose so packed free on board of the vessel in Buenos Aires during all of said period was the sum of 15 centavos per kilogram; that the total cost of said cooperage and delivery costs

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[37] Tr. p. 67.

[38] See the four letters allegedly constituting or evidencing the contract.

[39] Tr. pp. 22-23.

and charges for said 1135 tons of glucose during said period was the sum of $50,696.79; that the total market price in said Buenos Aires market for said 1135 tons of glucose during said period, calculated at said respective market prices and reduced to American dollars at the contract exchange rate aforesaid of 3.3582 to the dollar was and is the sum of $201,595.90; that the total cost of said glucose, cooperage and expense of placing said glucose on board ship in Buenos Aires was and is the sum of $252,292.69."

Mr. Berger, President of plaintiff, testified that the export market price was different from and bore no fixed relation to the domestic market price for glucose. He said:[40]

"Q. (By Mr. Bronson). Now the domestic bulk market was not the same as the export market, that is correct?

A. No. That is correct.

Q. And there is quite a substantial difference is there not?

A. That is right.

Q. And that is explainable, is it not, Mr. Berger, by the fact that you have a pegged price in exchange, that is, a pegged exchange on glucose that goes into foreign trade?

A. No. Your explanation isn't correct for that. *The pegged exchange rate has absolutely nothing to do with the price of glucose,* either for export or otherwise. The difference between the price of glucose for export and the price of domestic glucose is this: Domestic glucose is priced

[40]Tr. pp. 355-357.

much lower than the export price and *the Government permits a much higher price,* a much higher quotation for export glucose for any country, not just the United States, to offset the local prices at which local glucose is sold.

Q. Can you supply the court with any formula on the difference between the two, the domestic and the export prices?

A. I am not sure what you mean by formula?

Q. Well the percentage, the differential between the two prices, as a normal or an average matter.

A. That I could hardly do, because *that is done by the officials* and I have no way of knowing how they arrive at that.

Q. Well, does it differ as much as 50 per cent, that is, the domestic price from the export price?

Mr. L. B. Stanton. I would object to this line of examination, that Mr. Berger was not qualified as a market expert.

The Court. Well, he can answer. He can answer. You may answer, if you can. If not, he may say so.

The Witness. I am delaying only because I am trying to remember what might have been the case.

I am afraid I don't feel qualified to answer the question of differences, because they are not our figures. We are interested only in the export glucose.

Q. (By Mr. Bronson). When you are interested in export glucose, Mr. Berger, and are purchasing for export glucose, *you are in competition with the market for local glucose,* are you not?

A. *I would say not* in so far as an organization such as ours is concerned. The suppliers who made a specialty of that type of business would possibly be.

Q. Well, what you want to tell me is that I will have to content myself with the statement that *there is a great difference between the domestic glucose market and the export glucose market and that you can't go further and give us some figure or fraction representing that great difference in the two prices?* Do I understand you correctly?

A. That is correct."

Further, although plaintiff pleaded a domestic market price *throughout* the period of deliveries of from 57 to 60 centavos per kilo,[41] Mr. Berger testified that the *export* market price in August, 1946, was 1.23 to 1.25 pesos per kilo.[42] There was, therefore, a very substantial, arbitrary difference in the domestic and export market prices in August.

Plaintiff did not establish and the record does not show any *export* market prices for the periods involved in the alleged contract. All of the testimony relates to the domestic market prices at Buenos Aires, that is, the prices which *plaintiff* could have *purchased* glucose at Buenos Aires, Argentina, on the dates involved, and which glucose would not be in a condition for exportation.

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[41]Tr. p. 22.
[42]Tr. pp. 353 to 354.

(4) **Glucose was subject to "futures" contracts.**

The subject matter of the alleged contract, glucose, was dealt in Buenos Aires on a "futures" basis, that is, it was bought and sold for delivery at a future date and at a time when it was not in existence. Such was the case in the alleged contract here involved. The various references in the testimony and in plaintiff's brief to speculation is based upon this dealing in futures; the letter from plaintiff to Whipple dated June 3, 1946, at page 204 of the Transcript refers to a possible present sale to defendant of the whole 1947 production; and a letter of April 3, 1946, from plaintiff to Whipple, at page 197 of the Transcript also deals in a "futures" contract.

IV.

ARGUMENT.

A. MEASURE OF DAMAGES.

The measure of damages generally applicable to sales contracts is the difference between the market price and the contract price. The market price involved is that at which the seller could sell; not the price at which he could buy. This is obvious because the object of the rule is to make the seller whole. If, as is ordinarily the case, the seller has the goods on hand, he may sell them at the current price and recover the difference between it and the contract price from the buyer. In this manner, he secures the full benefit of the contract for he receives the purchase

price. The cost to him of acquiring the goods is immaterial.

Plaintiff's argument asserts the foregoing rule, but *assumes* that the market price involved in the above measure of damages is the market price at which *it* could have *purchased* the glucose. This erroneous assumption goes to the heart of, and is fatal to, plaintiff's position.

Plaintiff states that it could have purchased each month's glucose from the *domestic* Argentine market on each month in which a delivery was due; that it would then have spent so much per kilo for cooperage, etc. to prepare and deliver it for export; that its damage, therefore, is the difference between the total of the above items and the total contract price. Such difference amounts to a computation of profits, and not an application of the statutory measure of damages, which statutory measure plaintiff insists here be applied.

On this record plaintiff cannot properly apply, or argue for the application of, the statutory measure of damage (difference between the market and contract prices). This is so not because the measure is or is not the proper one, but because there is *no evidence* of market price. The market price involved in this contract is an *export* market price; not a domestic market price. Necessarily the export price—or the price at which plaintiff could sell—is higher than the price at which he could purchase on the domestic market. It was so in this very case. Indeed,

if this were not the fact, it would be engaged in a charitable business for there would be no profits incident thereto. That the export market price was different from the domestic market price is clearly established in plaintiff's own case. Mr. Berger specifically so testified, and his testimony is set forth at length above at pages 16-18.

Mr. Berger not only testified that there was a difference in the two market prices and that they bore no fixed relationship to each other but he also exemplified such difference. In its complaint plaintiff pleaded a market price at Buenos Aires over the period of the delivery schedule of from 57 to 60 centavos per kilogram.[43] Mr. Berger, however, testified that the *export* price during the month of August was from 1.23 to 1.25 pesos per kilo.[44]

Under the settled law of the State of California these facts require proof of the *export* market price in order to apply the proper measure of damages, or to recover *any* damages.

In *Boston Iron & Metal Co. v. Rosenthal,* 68 Cal. App. (2d) 564, 156 P. (2d) 963, the Court said (pp. 572-573):

> "In the first place the record shows that the price of scrap in this market for export was from \$1.50 to \$2.50 a ton higher than the domestic price. The witness Gruenebaum, called by Rosenthal, testified that the domestic price was in the neighborhood of \$11 per ton and the export price

[43] Tr. p. 22.
[44] Tr. pp. 353 to 354.

$1.50 or $2.00 higher, in July, 1937. This testimony alone would suffice to support the finding. Rosenthal himself when questioned with respect to the reasonable market value as of July 12th and a reasonable period thereafter answered: 'The market value local mills was around $11.50 a ton. * * * Q. And what is the export price on the same? A. Always $1.50 to $2.50, depending on how bad they want it—it always ranges from $1.50 to $2.50 a ton more than the local price.' It is true that Rosenthal later testified to $12.50 a ton, as the export price, but the weight and persuasiveness of such testimony were questions for the trial court. After the case was reopened the court remarked that his recollection was that there had been other testimony as to value, to which Rosenthal's counsel responded: 'Mr. Gruenbaum testified the reasonable market value was $13.50 and Mr. Rosenthal $12.50.' From a reading of the record it would seem that at the opening of the second hearing Rosenthal testified to $11.50 to $12.50 plus $1.50 to $2.50 a ton more, which would bring the export price up to a range of from $13 to $15. This would appear to be so, for the court was careful to inquire 'that is $12.50 a ton plus what, did you say? A. $1.50 to $2.50. Mr. Hollander: Q. What would that differential be for, was that export? A. Yes. * * * Q. In other words, that would be the naked price in San Francisco? A. 'That is right.' Later, undoubtedly referring to this testimony, the court remarked that Rosenthal had 'increased it from $13 to $15 a ton this morning'. Later on Rosenthal was questioned as to the *net* 'reasonable market value' and he an-

swered $10 and $10.50 a ton. He was not asked, nor did he say, whether this was the domestic or the export price but he certainly must have meant domestic in view of his earlier testimony. In addition to this testimony there is documentary evidence showing that during August (which was within the contract's time range for performance) Rosenthal sold on the 9th, 82.64 gross tons at $14.40 net per ton, on the 11th, 297.71 at $13.46 net and on the 18th, 420.76 at $13.46 net and that on September 30, which was a month beyond the time range for performance he sold 578.54 gross tons at $13.10. On July 26, 14 days after the cancellation, Rosenthal wrote Boston 'Besides this 1500 tons of Rail, I have about 1500 tons of ship scrap and railroad scrap. The local mills are paying $12.50 per ton for scrap today, but I am going to hold on to this scrap for a little while and wait for a better market.' Local mills of course meant *domestic market* and the export prices were higher, as we have seen. * * * With all this in the record we are satisfied that there was abundant evidence to support the court's finding that the market value was $13 a ton at the time of the breach and within a reasonable time thereafter."

As stated above, the facts relied upon by plaintiff in arguing for the application of the statutory measure do not support its argument, for they do not show the market price; rather, they tend only to show its cost of performance.

While the evidence is all to the effect that there *was* an export market price for the periods involved, the

record fails to disclose *what that export market price was* on the months involved.

An illustration of this situation is found in *S. P. Mill Co. v. Billiwhack Stock Farm, Ltd.,* 50 C.A. (2d) 79, 122 P. (2d) 650, where the plaintiff sought to recover judgment upon the identical theory of damages as plaintiff urges in this case. Plaintiff there took the *cost* of the goods to it, added transportation and processing charges and claimed that the result was the market or current price. The case was reversed upon appeal on the ground that plaintiff had not shown any market value which could be used in computing the proper measure of damages. The Court said (p. 88):

> "What the statute calls for is 'the market or current price.' ' "Market price" and "market value," when applied to any article, mean the same thing. They mean the price or value of the article established or shown by sales in the way of ordinary business. * * * "Market value" is the price at which goods are freely offered in the market *to all the world.*' (*Kings Co. Packing Co. v. Sunland Sales Coop. Ass'n.* (1929), 100 Cal. App. 126, 133 [279 Pac. 1036]—emphasis by the court.) The evidence quoted does not show that there was an available market, or that there was a current or market price for rolled barley at the time and place of the breach. In the absence of all these factors, section 1784 Civil Code provides other rules for estimating damages, but there is no evidence by which they can be applied."

It is clear, therefore, that the trial Court in applying the statutory measure of damages, correctly held

that "market price" as applied to this case means the price at which plaintiff could have *sold,* for *export,* and that its cost of performance was irrelevant.

There can also be no doubt of the fact that the evidence supports the trial Court's finding that the export market price on June 6, 1946, was 1.35 pesos per kilo. The evidence was to the effect, and the Court found, that there was no fixed or continuing relationship between the domestic and the export market prices. As stated above, Mr. Berger so testified. Plaintiff did produce evidence to the effect that the market price for domestic glucose in Buenos Aires during the month of June was 1.20 pesos per kilo.[45] Plaintiff's witnesses also testified that such domestic glucose could be processed for export for an additional cost of 15 centavos per kilo during the month of June. On the basis of this record the trial Court was entitled to find that while there was no constant relationship between the domestic and export prices nevertheless on June 6th the export price was 1.35 pesos per kilo.

See,

Lineman v. Schmidt, 32 Cal. (2d) 204, at p. 213, 195 P. (2d) 408.

In any event, plaintiff cannot complain of a finding based upon his own failure of proof. If any error resulted from the computation of the export market price, it was an error directly traceable to plaintiff's failure to make out a case for damages in any other amount. In order to urge this objection it is necessary

[45]Tr. pp. 494, 516, 527, 536, 541.

for plaintiff to point to evidence in the record which, under the law, the trial Court could or was bound to use in applying legal principles. There is no such evidence, and no proper computation of damages could be made by the trial Court other than the basis upon which it was made.

The foregoing discussion relates to the measure of damages as such, without regard to the date as of which damages should be fixed.

We will now show that the trial Court correctly selected June 6, 1946, as the date for fixing damages, for any one of three independent reasons:

(1) Plaintiff was under a duty to minimize damages;

(2) Damages for the breach of a contract to purchase future goods are determined as of the date of the breach; or

(3) Where a seller elects to treat an anticipatory repudiation as a breach and terminates the contract, damages are fixed as of such date of termination.

We will discuss these points in the order set forth.

B. DUTY TO MINIMIZE DAMAGES.

On June 6, 1946, defendant repudiated the alleged agreement.[46] For the purposes of the point to be dis-

[46]A repudiation, like a breach of contract, is effected unilaterally although plaintiff seems to argue the contrary on pages 26 et seq. of its brief. See *Kenner Co. v. McNeff Bros.*, 6 Cir., 102 F. (2d) 664, 666.

cussed in this section, it is immaterial whether plaintiff acquiesced in the repudiation or whether it decided to treat the contract as continuing in existence.[47]

The law is settled that a party to a breach of contract is under a duty to minimize his loss in so far as it is practicable for him to do so. This duty is a part of the law of damages. It does not itself constitute the measure of damages but the extent to which damages can and should be minimized must be deducted from the total amount which might otherwise have been recovered. The rule requiring minimization of damages is unaffected by the provisions of the Uniform Sales Act.

See,

Crane Iron Works v. Cox & Sons Co., 3 Cir., 28 F. (2d) 328;

8 *Cal. Jur.* 785;

Vitagraph, Inc. v. Liberty Theatres Co., 197 Cal. 694, 242 P. 709.

The authorities relied upon by plaintiff in support of its argument that the Court erred in selecting June 6, 1946, as the date for the determination of damages are not in point. While it is true that these cases involved installment contracts, the question of mitigation of damages was not involved in them.

For example, in *United States v. Burton Coal Co.*, 273 U.S. 337, 47 S. Ct. 351, 71 L. Ed. 670, the case

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[47]The trial Court, as we will show later, found that plaintiff acquiesced in the repudiation, and such finding is necessarily the result of the evidence concerning the activities and correspondence of the parties immediately following June 6th.

upon which plaintiff places primary reliance, damages were based upon the difference between the contract price and the market price on each of the delivery dates. However, no question of mitigation was involved.

On the other hand, in *Crane Iron Works v. Cox & Sons Co.,* 3 Cir., 28 F. (2d) 328, the question of mitigation was involved and the Court held that the *Burton* case was distinguished on this ground, and ordered damages computed as of the date of repudiation.

In the *Crane* case, the plaintiff agreed to sell pig iron to defendant, deliverable in installments over the first half of 1921. On November 16, 1920, the buyer repudiated the contract. The price of pig iron had dropped sharply from the time of making the contract to June, 1921, the time when the contract was to have been fully performed. The case was tried before a jury which was instructed that the measure of damages was the difference between the contract price and the market price at the time of performance "unless you should find that there was something that the Crane Iron Works might have done to lessen or minimize the damages." The jury returned a verdict of $1200.00 and plaintiff appealed, claiming it was error to admit the testimony of market value as of the date of the breach and to instruct the jury as above set forth because the measure of damages was fixed by the Uniform Sales Act. Plaintiff argued that the only relevant testimony as to market price was the market price for the months of January, February, March, April, May and June of 1921, the dates when the iron was to have been delivered. Plaintiff there,

as does the plaintiff in the instant case, relied upon the *Burton* case, claiming that it "sets at rest any question as to the measure of damages." Defendant, however, claimed that when it cancelled the contract on a falling market, it was the duty of the plaintiff to use reasonable diligence to mitigate its damages, and if it had done so the damages it suffered would not have been in excess of those found by the jury. The Circuit Court affirmed the judgment stating (p. 330):

> "The ultimate question before us, therefore, is whether or not the Uniform Sales of Goods Act of New Jersey abrogates the rule of law requiring the injured party on breach of a contract to use reasonable diligence in mitigating his damages. * * * At the argument counsel for plaintiff admitted that *the Uniform Sales of Goods Act does not repeal this rule of law. It is still the duty of an injured party to use due diligence to mitigate his damages on the breach of the contract.* * * *
>
> Was the plaintiff required to use due diligence to mitigate its damages in this case? The price of pig iron was constantly falling, with no prospect or indication of a rising market. The plaintiff knew, from the contents of the defendant's letters that it persisted in its determination not to perform the contract and had definitely canceled it * * *
>
> We think that the question of the mitigation of damages under the facts in this case was for the jury, and there was evidence to justify its conclusion. *The question of the mitigation of damages was not raised, and so was not before the court in the case of U. S. v. Burton Coal Co., supra.* It has no bearing upon the question upon

> which this case depends. It merely restates the law as declared in the New Jersey Sales of Goods Act."

In *Goldsmith v. Stiglitz,* 228 Mich. 255, 200 N.W. 252, the Appellate Court, in reversing a judgment, held that the trial Court erred in measuring damages as of the last day for delivery, where the fact showed that the seller after repudiation held the goods on a falling market. The Court said:

> "Plaintiff was bound to minimize his loss. This is settled law * * * the market was falling, and this fact was well known to the plaintiff. It was his duty to do what he could to save the loss."

In *Samuels v. E. F. Drew & Co.* (D.C., S.D., N.Y.), 286 Fed. 278, plaintiff sued for damages upon an anticipatory breach of a contract for the sale of goods deliverable in installments. The breach occurred when a receiver of defendant's assets was appointed, at a time prior to the delivery dates. The Court said (page 279):

> "The real question is that of the measure of damages for the anticipatory breach. The receivers contend that the difference on October 30th between the contract and market price for delivery on the dates fixed by the contract governs. *Claimants assert that the difference between the contract and market price on the dates fixed for delivery controls.* The parties are agreed that the appointment of the receivers created anticipatory breach of contract, conditional, as receivers contend, on their failure to adopt the contracts, and,

as claimants contend, on their renunciation, in each case, within a reasonable time.

Ordinarily, in a personal action for breach of contract of sale, the measure of damages is as claimant contends; but even in such an action, if, on the anticipatory breach, there be a *present* market price for the goods to be delivered in accordance with the original contract, *that price controls,* not the market price for immediate delivery either at the time of breach or at the time fixed in the contract for delivery. A ready illustration is a wheat contract, made in December for May delivery, with anticipatory breach in January. The better rule of damages, *because of the duty to mitigate damages* when reasonably possible, is the difference between the contract price on the one hand, and the market price in January of May wheat, not the price of January cash wheat or of May cash wheat, on the other hand, and this even though action be brought or tried after May. Sedgwick, Damages (9th Ed.) § 636-E."

The preceding case was affirmed on appeal (*Samuels v. E. F. Drew & Co.,* 2 Cir, 292 F. 734) the Appellate Court saying (page 738):

"The law seeks to give to the injured person the value of the contract of which he has been deprived, no more and no less, and the question here is: What was that contract right worth on October 30, 1920? And the answer is that such sum is to be determined by taking the difference between the contract and market prices on the date of the breach for the same quality of goods, not for immediate delivery, but for delivery at

the time and place specified in the contract. Roehm v. Horst, 178 U.S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953. When it is established that on the date of the breach the claimant could have entered into similar contracts for similar deliveries, the only damages to which he is entitled are represented by the difference between the contract price and the price at which he could have secured such contracts. This rule does not apply solely to commodities which are subject to systematic dealing in futures, and which have market quotations respecting deliveries on specific future dates, as contended for by the appellant. In the Horst Case, cited, hops were held to be a standard commodity. Cocoanut oil is no less a standard commodity. The rule is applicable, not only to commodities dealt in on the exchange where futures are bought and sold, but extends to all standard commodities having a market for future deliveries. The appellant substantially admits that contracts are frequently made for the sale of cocoanut oil for future delivery. This was the case here. The appellant admits it deals in the sale of cocoanut oil by contracting for future deliveries.

* * * There is a presumption that the receiver will not adopt a contract. If he does, it is a voluntary act of his own, to be performed with promptness; but, if he formally rejects such executory contract, the rejection dates back to the date of breach occasioned by the receiver's appointment. *In such cases there is need for mitigation of damages,* which is more striking than in the ordinary case. If the claimant elected to treat the contract as at an end, he should act

promptly; if he so desires, he may keep the contract open until the date of performance and then sue. He would be barred from proving a claim against the estate, inasmuch as the theory of allowing the proof of claims for breach of executory contracts against an insolvent estate necessarily presupposes that the contract has been broken by reason of the appointment of the receiver and cannot be kept open at the election of a claimant. *An executory contract claimant is entitled as damages only to the difference between the contract and the market value on the date of the breach of similar commodities for similar deliveries.* Pennsylvania Steel Co. v. N. Y. City Railway Co., 198 Fed. 721, 117 C.C.A. 503."

See, also,

Central Lumber Co. v. Arkansas Valley Lumber, 86 Kan. 131, 119 P. 321;

Fruit Growers Express Co. v. Citizens Ice and Fuel Co., 271 Ky. 330, 112 S.D. (2d) 54;

Chozo Yano v. Ledman, 188 N.Y.S. 764;

Sheldon v. Argos Mercantile Corp., 183 N.Y.S. 513;

Cron & Dehn v. Chelan Packing Co., 158 Wash. 167, 290 P. 999.

The above discussion also states the law of England.

See:

Roth & Co. v. Taysen, 73 L.T.R. 628.

It is also established that if, in attempting to mitigate damages, the plaintiff seller were to sell at the time of repudiation and the market thereafter rose, the fact that the market did rise would not affect his

right to such damages as would make him whole. That is, the right to recover for the difference between the contract price and the price at which he sold; the price on the date of repudiation.

See,

Restatement of Contracts, § 336(2);
Lamsas Flour Mills Co. v. Brandt, 98 Kans. 587, 158 P. 1120;
Dolfin v. Bruesselbach, 111 Colo. 525, 143 P. (2d) 1014;
Tillis v. Western Fruit Growers, Inc., 44 Cal. App. (2d) 826, 113 P. (2d) 267;
Boyles v. Kingsbaker Bros. Co., 5 Cal. (2d) 68, 53 P. (2d) 141;
22 *Cal. Jur. Sec.* 121.

The cases relied upon by plaintiff do not reach the point above made, and like the *Burton* case, are all distinguishable on the ground that the issue of mitigation was not involved.

We turn now to the evidence which compelled the trial Court to find that plaintiff was bound to sell the glucose on June 6th, or immediately thereafter in order to mitigate its damages.

It is agreed between the parties that the record supports the conclusion that the market for glucose was highly speculative. On page 60 of its opening brief plaintiff states:

> "The price from the two manufacturers remains fairly constant throughout the year 1946 at 60 centavos. The market had steadily risen from 78 centavos per kilogram in January, 1946, up to

1.05 pesos in April; and during May, advanced from 1.10 to 1.20. During May *it fluctuated quite rapidly.* The cause of this rise in fluctuation was that glucose was in the hands *of speculative middlemen.* Thereby, the rise in price and fluctuation was caused; it was especially violent, in that the brokers and dealers in glucose were only about 20 in number."

At page 21 of its brief, plaintiff states:

"The market was known to be highly speculative, and the new Peron government was just assuming control."

Further, plaintiff's witness Mr. Lakotas testified that at the end of May 1946 (Tr. pp. 555, 556):

"as the trade was waiting for regulation of exports by the new Peron government, dedicated at that moment to a campaign for reduction of the cost of subsistence, and there were no new export permits forthcoming although permits for sales up to the end of May had been conceded and these were exported accordingly."

Numerous exhibits establish the turbulent condition of the glucose market. See, for example, plaintiff's cable to Whipple dated May 20, 1946, stating:[48]

"You cannot delay twelve days and expect same price *market fluctuating seriously* immediate answer required if interested * * *"

Under these circumstances the trial Court was fully justified in concluding that a reasonable man would not, and plaintiff should not be permitted to, specu-

[48]Tr. p. 208; Pltf's. Exh. 20.

late on the future of such a market at the risk of the defendant buyer; that on the contrary he must be held to have disposed of the goods with the certain knowledge that the benefit of his bargain would be secured to him under the law permitting him to recover from the defendant the difference between the price at which he sold and the contract price. This is fully in accord with the California law, which in Section 3358 of the Civil Code provides, in effect, that one may not realize a profit as a result of a breach of contract.

On pages 21 and 22 of its brief, plaintiff states:

> "Appellant did not have on hand in June, nor was it required to have on hand the 1135 tons of glucose. Therefore, it was physically impossible for it to throw that quantity upon the market for sale in June."

The fact is that when plaintiff sold to defendant, the goods were not "on hand." They were not even in existence. Further, plaintiff was desirous of selling to defendant the whole of the production for the year 1947 which likewise was not "on hand."[49] Yet these goods were being sold and were being traded in the domestic and export markets at Buenos Aires, Argentina. The record shows quite conclusively that there was a market in futures for glucose in Buenos Aires for exportation, and there was a market for the commitments which plaintiff had from his suppliers.

This argument contrasts rather sharply also with the allegations of plaintiff's amended complaint

[49]Tr. p. 204; Pltf's. Exh. 19.

wherein it is alleged that between September 18, 1946, and April, 1947, it "assiduously endeavored to resell" said glucose, and that "on or about the 9th day of April, 1947, said plaintiff *sold and disposed* of the whole of said 1135 tons of glucose",[50] and that "*plaintiff purchased* on the Buenos Aires, Argentina, market said 1135 tons of glucose".[51]

We conclude, therefore, that the Court's finding that there was a market for these goods on June 6, 1946, is fully supported by the evidence adduced in plaintiff's own case. Further, the Court's finding that plaintiff, acting as a reasonable person, should have disposed of the goods in June, 1946, rather than speculate at the expense of a responsible purchaser, was also compelled by the evidence presented to the trial Court.

Plaintiff complains that June 6, 1946, under any theory, is the wrong date to select for fixing damages, and challenges Mr. Woolsey's authority to repudiate, etc. In this connection, the only evidence before the trial Court upon which its finding of market price as of June 6, 1946, could be based is to the effect that such prices obtained throughout the whole of the month of June, 1946. (See Brief for Appellant, p. 57.) Therefore, the trial Court's finding would necessarily be the same for any given date in June, 1946.

The fact situation presented in this case is not a common one before the courts. The reason is very

[50]Tr. pp. 24 and 25.
[51]Tr. p. 21.

well stated in a recent law review article (47 Mich. Law Rev. 538, at p. 545 (1949):

> "The paucity of cases bearing directly on this matter might be said to indicate that the problem is largely academic. It is suggested, however, that the explanation can be found in the fact that most business people are reasonable men interested primarily in production and the continuity of commercial activity; and when faced with an anticipatory breach, they have instinctively taken steps to mitigate. This is borne out by the fact that in most of the cases plaintiff has actually proceeded, and the only question is the reasonableness of his action."

On page 52 of its brief, plaintiff anticipates our argument based upon mitigation of damages, and argues that we may not urge this theory because it was not pleaded as an affirmative defense. Plaintiff's point is not well taken. Pleading in the federal courts is governed by federal law. (See Rule 8, Federal Rules of Civil Procedure.) The federal cases, as well as those in almost all states, hold that mitigation of damages need not be affirmatively pleaded.

> *Canton-Hughes Pump Co. v. Llera*, 123 C.C.A. 397, 205 F. 209, 215;
>
> *United States v. Homestake Mining Co.*, 54 C.C.A. 303, 117 F. 481, 490.

The cases cited by plaintiff on this point do not hold that the defense must be pleaded. They do hold that the burden of establishing a failure to mitigate is upon defendant. Assuming that such burden is a substantive matter controlled by California law, the

record fully supports the trial Court's finding that such burden has been met.

C. DAMAGES FOR THE BREACH OF A CONTRACT TO PURCHASE FUTURE COMMODITIES ARE FIXED AS OF THE DATE OF THE BREACH.

It is settled that where a contract is one for the purchase of "futures", an anticipatory repudiation fixes the date as of which damages are to be computed. The reason for this rule is that contracts calling for the purchase and sale of future commodities have a present value which should be taken as the proper basis for determining damages.

> *Renner Co. v. McNeff Bros.,* 6 Cir., 102 F. (2d) 664, cert. den., 60 S.Ct. 92, 308 U.S. 576, 84 L. Ed. 983;
>
> *Samuels v. E. F. Drew & Co.,* 2 Cir., 292 F. 734;
>
> *Cron & Dehn v. Chelan Packing Co.,* 158 Wash. 167, 290 Pac. 999.

In the *Renner* case the defendant buyer repudiated an executory contract calling for the sale and delivery of hops in installments. The Court stated (p. 666):

> "The principal question is whether the evidence as to the amount of appellee's damage is sufficient to support the finding of the District Court. The decision of this question in turn depends upon whether the correct measure of damages was applied.
>
> Appellant contends that the correct measure of damages is the difference between the contract

price and market price as of the times when the deliveries were to have been made under the contracts. This is the rule laid down in United States v. Burton Coal Co., 273 U.S. 337, 47 S. Ct. 351, 71 L. Ed. 670. No evidence was given of such prices, and if this rule is applied the judgment must be reversed. Appellee urges that under the rule of Roehm v. Horst, supra, where, as here, the commodity was bought and sold for future delivery, the correct measure of damages is the difference between the contract price and the market price of the hops in July, 1935, the time for repudiation, for delivery at the times called for in the contracts.

*   *   *   *   *   *   *

We see no reason to depart from the rule announced in Roehm v. Horst, supra. That case, on its facts, is almost identical with the instant case so far as the present question is concerned. It involved a series of contracts covering the furnishing of a specified number of bales of hops at different times during the period of five years, which period had not expired when the breach occurred, and when the action was instituted. It is a custom of long standing among hop dealers to do business by way of future contracts, and this custom was adhered to in the Roehm case, as in the present case. The court there applied the rule that 'plaintiff is entitled to compensation based, as far as possible, on the ascertainment of what he would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason of circumstances of which he ought reasonably to have availed himself,' and declared at page 2120

S. Ct. at page 788, that 'plaintiffs showed at what prices they could have made subcontracts for forward deliveries according to the contracts in suit, and the difference between the prices fixed by the contracts sued on and those was correctly allowed.'

"Appellant contends that the decision in United States v. Burton Coal Co., supra, in effect overrules that of Roehm v. Horst, supra. While it is subsequent, it does not refer to the Roehm case, and the facts present a substantial distinction. * * * Where, as here, there is an established market for the purchase and sale of such contract rights, the value of such rights at the time of breach is evidence of damage at the time of breach. Cf. Restatement of Contracts, Section 338. comment b. This feature presents the distinction between the Burton and the Roehm cases, supra, and the Roehm decision fits the instant case precisely. Applying its rule, the amount of the verdict was correct."

In the *Samuels* case the defendant, who had agreed to purchase installment of cocoanut oil from plaintiff was placed in the hands of a receiver before the time that the goods were to be delivered. It was agreed that the appointment of the receiver constituted an anticipatory breach. Plaintiff sued for damages and the lower Court fixed damages as of the date of the anticipatory breach. Plaintiff appealed claiming as does plaintiff in the instant case that damages should be determined by taking the differences between the contract prices and the market prices on the dates fixed by the contract for the deliveries of the install-

ments. The Appellate Court in affirming stated (pp. 738-739):

> "When it is established that on the date of the breach the claimant could have entered into similar contracts for similar deliveries, the only damages to which he is entitled are represented by the difference between the contract price and the price at which he could have secured such contracts. This rule does not apply solely to commodities which are subject to systematic dealing in futures, and which have market quotations respecting deliveries on specific future dates, as contended for by the appellant. In the Horst case, cited, hops were held to be a standard commodity. Cocoanut oil is no less a standard commodity. The rule is applicable, not only to commodities dealt in on the exchange where futures are bought and sold, but extend to all standard commodities having a market for future deliveries. The appellant substantially admits that contracts are frequently made for the sale of cocoanut oil for future delivery. This was the case here. The appellant admits it deals in the sale of cocoanut oil by contracting for future deliveries."

The foregoing rule is not new to this Honorable Court. It referred to and adopted the rule in the recent case of *United States v. Harris,* 9 Cir., 100 F. (2d) 268, where in affirming an award of damages for the breach of a contract to sever and purchase lumber, the Court said (pp. 277-278):

> "There is analogy between the situation here and cases involving contracts of sale of staple commodities for future delivery. Roehm v. Horst,

supra; Cron & Dehn v. Chelan Packing Co., 158 Wash. 167, 290 P. 999; Samuels v. E. F. Drew & Co., 2 Cir., 292 F. 734. In these cases it is held that an anticipatory breach effects a premature destruction of the contract, and that the injured party is entitled to compensation measured by the value of the contract at the time of its destruction. This value is to be determined 'by taking the difference between the contract and market prices on the date of the breach for the same quality of goods, not for immediate delivery, but for delivery at the time and place specified in the contract.' Samuels v. E. F. Drew & Co., supra, 292 F. 738."

Since it appears without conflict in the record that the instant contract involved the sale of future goods and the existence of a domestic and an export market for such future goods was established by plaintiff's own case, the above rule applies and the trial court on this ground also correctly fixed the damages as of the date of repudiation, namely: June 6, 1946.

D. PLAINTIFF ELECTED TO TREAT DEFENDANT'S REPUDIATION AS TERMINATION OF THE CONTRACT AND DAMAGES SHOULD BE COMPUTED AS OF THE DATE OF THE REPUDIATION.

Plaintiff argues that a seller need not treat a buyer's repudation of the contract as an anticipatory breach. This is correct. A seller, in such a case (unless the contract involves future goods, and in the absence of any duty to mitigate damages), may treat

the contract as subsisting, await the time for performance, and if the buyer persists in his repudiation, recover damages measured by the difference between the contract price and the market value of the goods at the time when such goods ought to have been accepted. The reason for this rule is clear. The contract is not terminated by the buyer's repudiation, for one party cannot unilaterally destroy the binding force of a valid contract. If the seller elects to continue the contract in existence, in looking for the correct measure of damages it is, of course, logical and correct to resort to the delivery dates specified in the still existing contract.

However, the adoption of such election gives rise to a correlative right in the buyer: he may effectively withdraw the repudiation at any time prior to the date for performance, and upon withdrawal of such anticipatory repudiation there remains no cause of action even for nominal damages (*Williston on Contracts,* Sec. 1335). In other words, there is nothing equivocal about such election; the contract continues in existence and if, at the time of delivery the buyer accepts the goods, the seller cannot be heard to complain.

But the rule is different when the seller elects to adopt the repudiation of the contract by the buyer as a breach and acquiesces thereto. The effect of this election is succinctly stated in *Alderson v. Houston,* 154 Cal. 1 (96 Pac. 884), on page 12.

> "Upon the election to treat the renunciation, whether by declaration or by acts and conduct, as a breach of the contract, the rights of the

parties are to be regarded as then culminating, and the contractual relation ceases to exist, except for the purpose of maintaining the action for the recovery of damages."

To the same effect are

Atkinson v. District Bond Co., 5 Cal. App. 2d 738 at 743, 43 P. (2d) 867;

6 *Cal. Juris.* 460.

It is not necessary that plaintiff should indicate his election by bringing suit at once. He can show his election by his acts and conduct.

See,

Bu-Vi-Bar Petroleum Corp. v. Krow, 10 Cir. 40 F. (2d) 488.

Once the seller elects to treat the contract as terminated, of course withdrawal of the repudiation is no longer possible *(Williston, Contracts,* Sec. 1335).

The trial court has found that in this case, plaintiff acquiesced in the breach, and elected to treat the contract as terminated.[52] This finding is fully supported by the evidence as we have shown above.[53]

The contract, then was terminated on June 6, 1946. This termination was effective as to *defendant* (since it lost its right to withdraw the repudiation) as well as for plaintiff. Under these circumstances plaintiff appropriated the goods (or contract rights to secure them as future goods) to his own use, and thereafter

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[52]Finding No. 7, Tr. p. 65.

[53]See pp. 7-14 of the Statement of Facts.

kept, sold or otherwise disposed of them for his own account and at his own risk or benefit.

The ultimate purpose of any measure of damages is to make the promisee whole and secure to him the benefit of his bargain. In situations such as the instant case, there is only one such measure that will operate justly in general application: damages should be measured as of the date of termination of the contract; the date upon which the seller elects to appropriate the goods to his own use and benefit.

A seller obtains the full benefit of his bargain if he gets as damages the difference between the contract price and the value of the goods at such date of termination. It should make no difference whether the seller resells the goods or not. Since title to the goods is in the seller and the contract is terminated, he can of course do with his goods anything he pleases. What counts is the value of the goods at the time of the termination, and such value is the market price at such time, regardless of whether the seller sells the goods or decides to keep them.

Turning now to the law, the rule is stated as follows in 15 *Am. Jur.* 448:

> "Thus, where a repudiation of a contract prior to the time for performance is accepted by the other party as a breach, the damages are to be computed as of the date of the repudiation. But where he does not accept the anticipatory repudiation and treats the contract as in force until after the time for performance has passed, the damages are to be computed as of the time fixed for performance."

In 46 *Am. Jur.* 752, it is said that "the prevailing view is that where the seller has elected to adopt the repudiation of the contract by the buyer as a breach thereof, and to bring action for the breach, the measure of damages is computed on the basis of the difference between the contract price and the market value of the goods or merchandise at the time of the repudiation." See also:

34 *A. L. R.*, 114, 115;
44 *A. L. R.*, 215, 242;
McNeff v. White Eagle Brewing Co., 294 Ill. App. 37, 13 N.E. (2d) 493.

In *Rice v. Schmid,* 18 Cal. (2d) 383, 115 P. (2d) 498, plaintiff and defendant entered into an agreement for the sale by plaintiff of 6,000 barrels of flour, to be delivered in 90 days upon instructions by defendant. The contract was to be automatically extended if, on account of the fault of the buyer, not all of the flour was shipped within 90 days *unless plaintiff chose to terminate it* on that ground. Seventeen months after the date of the contract, the buyer refused to furnish instructions for the delivery of the remaining 3245 barrels and plaintiff notified the buyer of *his election to terminate* the contract and demanded damages. The Court held that "damages should be the difference between the contract price and the market price on the date of *final termination* of the contract." (18 Cal. (2d) at p. 388).

On a second appeal in the same case *(Rice v. Schmid,* 25 Cal. (2d) 259, 153 P. (2d) 313) the Court quoted and reaffirmed its holding that the *termination*

date was to be taken in fixing damages (25 Cal. (2d) at p. 262).

The case was tried and again appealed *(Lineman v. Schmid,* 32 Cal. (2d) 204, 195 P. (2d) 408). The Supreme Court reviewed its earlier decision, stating (p. 206):

> "The first trial resulted in a judgment for the plaintiff in the sum of $712.45 damages. That purported amount of the plaintiff's loss on the undelivered flour was based on the market price of the flour on the date the contract was executed. The plaintiff appealed and the judgment was reversed. *(Rice v. Schmid,* 18 Cal. (2d) 382 [115 P. 2d 498, 138 A.L.R. 589]) on the ground that the correct measure of damages was the difference between the contract price and the market price for each brand of flour on December 2, 1938, *the date of termination* or breach of the contract. The trial court was directed to determine the amount of damages in accordance with the stated measure and enter judgment for the plaintiff for the amount so found."

Although the facts in the *Rice v. Schmid* cases are in some respects different from those of the instant case, the Court specifically held that the "termination" date governed in fixing damages.

See, also, the numerous cases cited in 44 A.L.R. at p. 242, under the heading: *"Contract Price Less Value at Time Seller Acquiesces in Breach."*

The situation involved in the instant case—that is, acquiescence to an anticipatory breach—must be distinguished from two different situations:

(1) Where the seller refuses to acquiesce in the breach but instead treats the contract as subsisting; and

(2) Where he continues to treat the contract as subsisting and is entitled to and does sell the goods as agent for the buyer, and then sues the buyer for the *purchase price* less the amount already received through resale for the buyer's account.

In the instant case, plaintiff acquiesced in the breach, and has sued for *damages,* not for the purchase price.

The cases cited by plaintiff are distinguishable for one or both of the above reasons.

If there should be any doubt as to the sufficiency of the evidence to establish plaintiff's acquiescence to the anticipatory breach on June 6, 1946, there certainly can be no doubt that he acquiesced thereto by his letter of September 18, 1946.

In this latter connection, plaintiff, on pages 13 and 14 of its brief, states that the evidence is uncontradicted that the market price was 60 centavos or less in September, 1946. Plaintiff is incorrect. The Court's finding of an export price in September, 1946 of 1.25 pesos per kilo[54] is fully supported by the evidence of plaintiff's own president[55] and it computed the *export* price here in the same manner as done for June, 1946.

[54]Tr. p. 66.
[55]Tr. pp. 369, 378; Deft's. Ex. Q.

E. THE CURRENT RATE OF EXCHANGE WAS PROPERLY ADOPTED IN ASSESSING DAMAGES.

If plaintiff is entitled to damages at all, he is entitled only to that number of dollars which will purchase for him Argentine pesos to the extent of his loss.

Argentine law imposes a "pegged" rate of exchange in export sales of glucose. This rate is arbitrary and bears no relation to the free rate of exchange. The Argentine seller realizes no advantage from this law; the effect is merely that the American purchaser must spend more dollars to acquire the same number of pesos.

Plaintiff would have been compensated, under the alleged contract, by receiving from defendant 1.375 *pesos* per kilo. It is immaterial to plaintiff how many dollars defendant would have had to spend to buy that many pesos to give to plaintiff. There is, of course, no arbitrary, pegged rate applicable to the judgment herein. Plaintiff will purchase pesos at the free rate of exchange. It seems self-evident that plaintiff should receive only the number of dollars which will allow him to purchase only the number of pesos in which he has been held to be damaged. Plaintiff argues, on the other hand, that he should be given enough dollars to purchase *more* than the number of pesos in which he has been damaged.

Under section 3358 of the California Civil Code, plaintiff should not be allowed to succeed in his attempt.

See, in this connection:

The Saigon Maru (D.C., D. Ore.), 267 Fed. 881;

The Hurona (D.C., S.D. N.Y.), 268 Fed. 910;

Liberty Nat'l. Bank v. Burr (D.C., E.D. Ga.), 270 Fed. 251;

"Money in the Law", Prof. Arthur Nessbaum, 1939 ed., p. 487;

16 *N.Y.L.Q.* 559;

25 *C. J. Sec.* 561.

Plaintiff also argues, alternatively, that the free rate of exchange at the date of the breach, rather than at the date of judgment, should be used in fixing the amount of dollars recoverable. This theory is subject to the same objection. At the date of the breach, plaintiff was damaged in a given amount of pesos. As far as it, in Argentina, is concerned, that number of pesos is the same on June 6, 1946, or any subsequent date. There is no reason for permitting plaintiff to make a profit on the rate of exchange merely because he is permitted to sue in the United States. If its suit were brought in Argentina, he would receive his damages, if any, in the given amount of pesos, and without regard to the rate of exchange. He would realize no profit through the fluctuating free rate.

If plaintiff's argument has any validity in reason, it could more effectively be made with respect to domestic judgments. For example, the "value" of the American dollar, and its purchasing power, has declined substantially over the last several years. On the theory argued, a plaintiff in an action for breach

of a domestic contract could claim that he should receive more dollars in 1949 than he received because of a breach occurring several years earlier, in order to equalize the effect of the intervening inflation. Such an argument would actually be more logical than plaintiff's, but certainly would not be entertained by the Courts.

While it cannot be denied that there is conflict upon the point, the logic of the reasoning in *Tillman v. Russo Asiatic Bank,* 2 Cir., 51 F. (2d) 1023, cannot be refuted. The Court there said (p. 1025):

> "Various defenses to each cause of action were raised, but the principal question was whether any proof was made of the value of the rubles in United States currency. Where a debt is due in a foreign country payable in the currency of that country, and suit is brought on it in the United States, the Supreme Court has held the plaintiff should recover what that currency is worth in this country on the day of judgment. Justice Holmes, who laid down the foregoing rule in Deutsche Bank v. Humphrey, 272 U.S. 517, 47 S. Ct. 166, 71 L. Ed. 383, said that the date of judgment, and not the date of the breach, was the proper time for figuring the rate of exchange because 'a suit in this country is based upon an obligation existing under the foreign law at the time when the suit is brought, and the obligation is not enlarged by the fact that the creditor happens to be able to catch his debtor here.' "

We say, therefore, that the trial Court properly used the free rate of exchange on the date of the judgment in determining the damages.

F. COMPUTATION OF DAMAGES AND OTHER POINTS.

Plaintiff argues, as a basis for reversal, that the trial Court made a mathematical error of some $17.51 in computing the judgment. Since this is a ministerial matter it would not appear to constitute reversible error. If it should become necessary, this Court has power to correct any such error, or order it corrected without any necessity for a retrial.

Plaintiff also attacks Mr. Woolsey's authority to make or communicate to plaintiff the repudiation of June 6, 1946. While there is evidence of his authority, the fact that both parties acted upon the repudiation, and that defendant ratified his action (assuming the necessity therefor) is too clear from the record to call for extended argument.

V.

CONCLUSION.

As stated above, defendant denies that plaintiff is entitled to damages in any amount, and in its own Appeal, seeks a review by this Honorable Court of the evidence upon which a contract was found by the trial Court to exist. This response to plaintiff's brief on appeal necessarily *assumed* the existence of a contract. Upon the basis of such assmuption, we submit that the trial Court correctly determined the amount of damages on one or more of the three theories above set forth, and that it correctly refused to allow plaintiff a gratuitous profit in pesos by adopting a rate of ex-

change which bears no relation to the amount of plaintiff's damages.

Defendant submits that if this Honorable Court should find, contrary to defendant's contentions, that a contract existed between the parties, the judgment of the trial Court should be affirmed on the issue of damages.

Dated, San Francisco, California,
December 19, 1949.

Respectfully submitted,
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